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THE "NIXON SABOTAGE": THE POLITICAL ORIGINS OF THE EQUAL PROTECTION CHALLENGE TO THE VOTING RIGHTS ACT

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Abstract: Critics of the Voting Rights Act argue that the anti-discrimination law requires states to engage in unconstitutional discrimination, as state decisionmakers must be conscious of race in order to ensure that voting policies do not weaken minority representation. This argument relies on the idea that subjective racial motivation is the essence of unconstitutional discrimination (even if benevolent, or to promote racial inclusion). The conventional understanding among constitutional scholars is that this "search for the bigoted decisionmaker" developed in employment and housing discrimination decisions between 1976 and 1979. Previous accounts have not recognized the role that the 1971 school desegregation decision of *Swann v. Charlotte-Mecklenburg Board of Education* played in laying the foundations for this definition of unconstitutional discrimination. *Swann* is important because it vividly illustrates how the elected branches gave traction to the present definition of unconstitutional discrimination. The justices' archives reveal the *Swann* Court's uncertainty about focusing on the racial motives of present authorities as the basis for finding unconstitutional discrimination, and that a narrow majority preferred a draft of the opinion that eschewed this approach. Yet all

* J.D., Yale Law School. This is the first of two companion pieces addressing how politics influenced the meaning of unconstitutional discrimination. The second will be published in Volume 34 of the *Boston College Journal of Law & Social Justice.*

I am very grateful to Bruce Ackerman for exposing me to the politics of the Civil Rights Era, and for directing me to investigate the justices' papers from the school desegregation cases discussed in this essay. For much more comprehensive analysis of the interplay between Congress, the President, and the Supreme Court in shaping the constitutional values that emerged from the Civil Rights Era, see Bruce Ackerman, We the People, Volume 3: Civil Rights Revolution (forthcoming 2014). I am also very much indebted to Reva Siegel's work showing the ways federal courts employed effects evidence to review decisions of representative government in the Equal Protection cases of the 1970s, and how the Supreme Court's discriminatory purpose cases replaced oversight with deferential review. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278 (2011); Reva B. Siegel, The Law (and Politics) of Disparate Impact (Feb. 10, 2013) (unpublished manuscript) (on file with author). I am also grateful for Reva Siegel's very helpful comments on this essay. Thanks to professors Linda Greenhouse and Michael Graetz for their seminar on the Burger Court and for supervising an earlier version of this essay. And thanks to Celia Choy for discussion that inspired the framing of this essay.

justices acquiesced to Chief Justice Burger's self-assigned opinion, which emphasized subjective racial motives as the core of unconstitutional discrimination, and as Justice Douglas described it, "wr[ote] President Nixon's view . . . into the law." The justices did so because they perceived unanimity as necessary for compliance in the face of both political branches objecting to judicial authority in the area of school desegregation. *Swann* demonstrates how the view of unconstitutional discrimination that centers on racial motives first gained traction out of deference to political branches calling for limits on judicial policymaking. This concern that animated defining unconstitutional discrimination in terms of racial motives—judges making social policy under the guise of constitutional remedies—does not apply in the current challenge to the Voting Rights Act, when the Court is asked to extend the racial-motives limitation, forged in deference to elected officials, to restrict the ways that elected officials have chosen to address discrimination.

Introduction

Critics of the Voting Rights Act argue that the anti-discrimination law, designed to eliminate racial discrimination in voting, requires states to engage in unconstitutional discrimination.[1] This conflict arises from the contemporary view that racial motivation is the essence of constitutionally prohibited discrimination. Under this view, policies that effectively exclude members of one race—school zoning that reinforces neighborhood segregation, voter identification laws that disproportionately keep Hispanic voters away from the polls, and "verbal skills" tests that systematically disfavor black job applicants—are constitutionally permissible if the burden on racial groups is apparent but not intended, or incidental.[2] And the corollary of this focus on racial motives as the essential characteristic of unconstitutional discrimination is that racial motivation designed to include, rather than exclude,

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[1] *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (arguing that Title VII forces unconstitutional discrimination by "requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes"); Brief Amicus Curiae of Pacific Legal Foundation et al. at 11–13, Shelby Cnty., Ala. v. Holder, No. 12–96 (U.S. argued Feb. 27, 2013), 2013 WL 50689 [hereinafter Brief Amicus Curiae] (complaining that Section 5 is chiefly enforced by the "effects test" which "embodies an explicit racial classification").

[2] For further discussion, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1130 (1997), stating "the Constitution permits the state to act in ways that perpetuate, or even aggravate, the racial stratification of American society; it is only race-based state action or state action animated by racially discriminatory purposes that violates tenets of equal protection . . . ."

members of different races is also claimed to be suspect as unconstitutional discrimination.

Although the Constitution does not prohibit unintended racial discrimination, Congress has chosen to address such discrimination through Title VII of the Civil Rights Act, which prohibits employment criteria that tend to exclude applicants of a particular race, and Section 5 of the Voting Rights Act, which prohibits covered states from changing their voting policies in ways that effectively weaken a minority group's ability to elect its preferred candidate.[3] As these public policies are threatened by the understanding that any form of racial motivation is unconstitutional, I aim to illustrate how this understanding gained traction out of deference to political pressure.[4] This is particularly relevant now, as critics urge the Court to extend the racial-motives limitation, shaped by deference to political branches, to limit how the political branches can define discrimination.

Unconstitutional discrimination has not always been defined in terms of racial motivation. During the late 1960s and early 1970s, courts were called upon to address segregated attendance patterns that persisted in southern school systems over a decade after the Court outlawed official segregation and states abolished laws that overtly segregated students. These courts began to question whether racial motivation, or official action contrived to segregate students, was a necessary element of unconstitutional discrimination. School boards defended the present segregated attendance patterns on the grounds that they were a result of lasting private discrimination, rather than contemporaneous official action intended to segregate students. These school boards argued that if racial motivation was the constitutional wrong, present day officials were innocent, as they harbored no racial motives; the racially-motivated decisions were made so long ago that they had no bearing on the intent of present school authorities, and these remote decisions should not be a

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[3] *See* 42 U.S.C. §§ 1973c, 2000e (2006).

[4] I am not the first to make this point. Reva Siegel observes that the Equal Protection-discriminatory purpose decisions of the Burger Court restricted the role of federal courts in overseeing the disestablishment of racial segregation out of concern for separation of powers and federalism values, effectively shifting the prerogative for making antidiscrimination policy to elected branches of government. Reva Siegel, The Law (and Politics) of Disparate Impact 3, 41 (Feb. 10, 2013) (unpublished manuscript) (on file with author). Siegel also notes that in recent years the Court has been rescinding this deferential principle by exerting increasing control over elected officials' antidiscrimination initiatives. *Id.* at 33. This essay corroborates Siegel's claim by illustrating the extent to which emphasis on racial motives was a compromise to President Nixon and Congress's resistance, and locating the roots of discriminatory purpose analysis even earlier in the decade, showing how the busing conflict caused the discriminatory purpose limitation to gain traction.

basis for liability of present-day officials.[5] Where racial motives were remote in time or ambiguous, courts regularly considered evidence of disparate or segregative effects in determining whether segregated patterns amounted to unconstitutional discrimination.[6] The conventional understanding among constitutional scholars is that the Supreme Court declared racial-motivation ("the search for the bigoted decision-maker"[7]) as the essence of unconstitutional discrimination in employment and housing discrimination decisions between 1976 and 1979.[8] These accounts overlook how this formulation gained meaningful traction several years earlier, in the Supreme Court's 1971 school desegregation decision of *Swann v. Charlotte-Mecklenburg Board of Education*.[9] *Swann*'s role is particularly significant because it illustrates how deference to political decision making first influenced the Court's focus on racial motives as the core of unconstitutional discrimination. In fact, a majority of the *Swann* Court expressed reservations about the relevance of racial motives; expressing concern that limiting judicial remedies to undoing race-motivated decisions would leave unaddressed many forms of entrenched patterns of racial separation, set in motion by state action

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[5] Brief of Respondents at 46, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (No. 281), 1970 WL 122646 ("[F]rom the moment *Brown I* was announced all federal, state and local laws requiring or permitting segregation were void and of no effect. On and after May 31, 1955, there plainly could be no *de jure* racial discrimination in any school system in the United States. What was left, North and South, was segregation in the schools in fact.").

[6] *See* Siegel, *supra* note 4, at 8–9 (discussing the role of effects evidence in Equal Protection decisions of the Supreme Court and federal courts of appeal).

[7] *See* Laurence H. Tribe, American Constitutional Law 1509 (2d ed. 1988).

[8] Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1785 (2012). Lopez explains that the consensus among constitutional scholars is to recognize *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976), as the source of the discrimination doctrine "requir[ing] direct proof regarding the minds of government actors." *Id.* Lopez also questions this consensus, observing that courts were looking to a different form of purposeful discrimination before these cases, but contends that prior to these decisions the meaning of intentional discrimination was a contextual inquiry into whether "the interests behind the challenged government action were generally legitimate or illegitimate, innocent or tainted by racism—rather than establishing whether prejudice or bias on the part of any individual was directly at work." *Id.* at 1797. Lopez also overlooks how *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970), influenced this standard. For further discussion, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470 (2004), recounting the evolution from focus on discriminatory effects to focus on race-conscious decision making, and Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997).

[9] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

that occurred decades ago, and could not be traced to the motives of contemporary authorities. *Swann* shows how values of judicial restraint undergirded the contemporary understanding of unconstitutional discrimination as much or more than the majority's understanding of what it meant to violate constitutional equality guarantees. This raises the question of what role the value of judicial restraint should play in today's decisions, where parties ask the Court to restrict the way that elected officials may define and address discrimination.

I. The Battle over Busing

During the late 1960s and early 1970s, President Nixon was charged with a complicated balancing act: The public had "extraordinary expectations" after *Brown v. Board of Education* and the passage of the Civil Rights Act, both recognized as great triumphs of the preceding decade.[10] More than a decade after *Brown* outlawed official segregation, courts were faced with suits challenging lasting segregated attendance patterns. This required the Supreme Court to determine at what point a state had discharged its duty to dismantle a formerly segregated system, and whether state actors could be required to take measures to undo segregation that resulted from policies adopted by former officials many decades ago, and had been abandoned over a decade ago.[11] Many of the race-neutral assignment policies that states had adopted following *Brown*—i.e., allowing students to voluntarily transfer out of their formally segregated schools, or assigning students to their neighborhood schools—had the effect of perpetuating previously segregated school assignments or residential segregation (these were intertwined, because segregated schools had led to segregated neighborhoods). In 1968, in *Green v. County School Board*, the Court held that a "freedom of choice" policy that gave white and black students the option of transferring out of their formerly segregated schools did little to ameliorate racial separation—so few students transferred that there was still effectively a "white" school and a "black" school.[12] Thus, the Court required the county to integrate students so that the schools were no longer "'racially

[10] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. Negro Hist. 187, 187 (1998); *see also* Dean J. Kotlowski, Nixon's Civil Rights: Politics, Principle, and Policy (2001) (discussing President Nixon's policies on civil rights).

[11] *See, e.g.*, Green v. Cnty. Sch. Bd., 391 U.S. 430, 431–32 (1968).

[12] *Id.* at 440–42.

identifiable.'"[13] Following *Green*, lower courts throughout the country began to strike down neutral state policies that effectively preserved segregation, absent evidence that *present day* school authorities adopted the policies with racial motives. For instance, in 1969 the U.S. Court of Appeals for the D.C. Circuit affirmed a decision finding that Washington D.C.'s race-neutral policy of assigning students to their neighborhood schools was unconstitutional because it had the foreseeable effect of perpetuating residential segregation, even if the school board did not intend to segregate students.[14] The court explained, "we . . . firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[15]

At the same time, public outrage was mounting as parents objected to court orders forcing their children to transfer to a remote school, because many families chose their residences based on proximity to a desired local school. Members of Congress proposed legislation that prohibited courts from ordering students to be bussed between school districts, to be assigned to schools based on their race, or attempt to equalize attendance between the races.[16] They declared that "[p]arents are not going to permit their children to be boxed up and crated and hauled around the city and the country like common animals,'" and encouraged support of these amendments to "prevent our schools from becoming the laboratories of fanatical social reformers and race-obsessed judges."[17] In 1970, the Senate passed an amendment requiring school desegregation to be implemented the same way throughout the country, regardless of the history of segregation in a particular region.[18] Southern members of Congress thought it unfair that northern

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[13] *Id.* at 440 n.5, 441 (quoting U.S. Comm'n on Civil Rights 1967, Southern School Desegregation, 1966–1967, at 88 (1967)). In the three years that the county's freedom of choice plan had been operating, not a single white child has chosen to attend the formerly "black" school and only 115 black children enrolled in formerly "white" school, leaving eighty-five percent of the black students attending the "black" school. *Id.* at 441.

[14] Smuck v. Hobson, 408 F.2d 175, 183 (D.C. Cir. 1969), *aff'g* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

[15] *Hobson*, 269 F. Supp. at 497. Then a judge on the D.C. Circuit, Justice Burger dissented, quoting commentators who criticized the decision's "unclear basis in precedent, its potentially enormous scope, and its imposition of responsibilities which may strain the resources and endanger the prestige of the judiciary." *Smuck*, 408 F.2d at 196 (Burger, J., dissenting) (quoting Note, Hobson v. Hansen: *Judicial Supervision of the Color-Blind School Board*, 81 Harv. L. Rev. 1511, 1525 (1968)).

[16] Warren Weaver, Jr., *South's Senators Seek Busing Ban in Fund Measure*, N.Y. Times, Feb. 5, 1970, at 1.

[17] *Id.* (internal quotation marks omitted).

[18] Act of April 13, 1970, Pub. L. No. 91-230, 84 Stat. 121.

cities got away with segregated attendance patterns merely because they had not officially segregated students; they hoped that northerners would stop supporting desegregation if they were subject to the same desegregation busing that the South had been.[19] Yale Law School Professor Alexander Bickel published a well-known article concluding that widespread school integration would not be attained quickly because no one was certain that the benefits outweighed the costs.[20] The Washington Post observed that "Congress seems sure this year to finally pass an anti-integration amendment," which might give rise to a constitutional conflict between Congress and the courts.[21]

President Nixon was on the side of Congress and popular opinion in opposing judicial activism in the area of school desegregation. In the 1968 election, Nixon had campaigned on the promise of appointing a southerner to the Court, and looking for judges who were "strict constructionist[s]."[22] When Justice Abraham Fortas, a liberal who was President Johnson's nominee for replacing Chief Justice Warren, failed Senate confirmation due to corruption allegations, Nixon appointed Burger to Chief Justice.[23] Then Nixon's Justice Department, based on legal memoranda prepared by then-Assistant Attorney General William Rehnquist, initiated a criminal investigation against Justice Fortas—the first criminal investigation ever initiated by the Executive against a sitting Justice—and leaked the story to the press in order to pressure Justice Fortas to resign from the Court entirely.[24] Upon Fortas's resignation, Nixon unsuccessfully nominated two southern judges, Clement Haynsworth and G. Harold Carswell, both of whom the Senate rejected, in part, because they had both overtly endorsed segregation.[25] Nixon

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[19] *See* Warren Weaver, Jr., *Ribicoff Attacks Schools in North; Supports Stennis*, N.Y. Times, Feb. 9, 1970, at 1.

[20] Alexander M. Bickel, *Desegregation: Where Do We Go from Here?*, New Republic, Feb. 7, 1970, at 20, 22 ("Massive school integration is not going to be attained in this country very soon, in good part because no one is certain that it is worth the cost.").

[21] Rowland Evans & Robert Novak, *Integrationists at HEW Losing Fight for Full Administration Support*, Wash. Post, Feb. 18, 1970, at A17.

[22] John A. Jenkins, The Partisan: The Life of William Rehnquist 95–96 (2012) (internal quotation marks omitted).

[23] *See id.* at 90–94.

[24] *See id.*

[25] *See id.* at 96–101. Then Assistant Attorney General Rehnquist was responsible for vetting nominees. *See id.* at 95–96. He described Haynsworth as a "strict constructionist" who "will not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs." *Id.* at 96. Carswell had been involved in the formation of several "white only" clubs, and in a public speech he had stated "I believe that segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed and I shall always so act . . . ." *Id.* at 99.

declared that he would not subject another southerner to this "kind of malicious character assassination," an "act of regional discrimination," and promised that "the day will come when men like Judges Carswell and Haynsworth can and will sit on the High Court."[26] Instead of a southerner, Nixon appointed Harry Blackmun, Burger's childhood friend.[27] Blackman was also the best man at Justice Burger's wedding (they were called "the Minnesota twins"), and Nixon expected him to vote with Burger.[28]

In a March 1970 statement on school desegregation—a particularly legalistic opinion for the President to deliver in a public address—Nixon described "serious problems" arising from the "accelerating pace" of school desegregation.[29] The President stated that, "[i]n the absence of definitive Supreme Court rulings," there were "both real and apparent contradictions" among lower courts on how to address these problems.[30] Furthermore, Nixon reiterated that "[t]wo very recent Federal court decisions continue to illustrate the range of opinion[s]: a plan of a southern school district [was] upheld even though three schools remain[ed] all-black, but a northern school system [was] ordered by another Federal court to integrate all of its schools completely . . . ."[31] And Nixon set forth an authoritative summary suggesting the proper constitutional principles applicable to school desegregation: "[w]hatever a few lower courts might have held to the contrary, the prevailing trend in judicial opinion" is that "*de jure* segregation arises by law or by deliberate official action and is unconstitutional" whereas "*de facto* segregation results from residential housing patterns and does not violate the constitution."[32] Accordingly, President Nixon stated that "[i]n determining whether school authorities are responsible for existing racial segregation—and thus whether they are constitutionally required to remedy it—the *intent* of their action . . . is a crucial factor."[33] President Nixon also recognized that "where housing patterns produce substantially all-Negro or all-white schools, and where this racial separation has not been caused by deliberate official action[,] school authorities are not consti-

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[26] *Id.* at 101 (internal quotation marks omitted).

[27] *Id.*

[28] Jenkins, *supra* note 22, at 101.

[29] Presidential Statement About Desegregation of Elementary and Secondary Schools, 1970 Pub. Papers 304, 310 (Mar. 24, 1970).

[30] *Id.* at 308.

[31] *Id.*

[32] *Id.* at 309.

[33] *Id.* at 309–10.

tutionally required to take any positive steps to correct the imbalance."[34] And further indication of Nixon's reservation about aggressive school desegregation was that he "eased" his good friend, Robert Finch, the Secretary of Health, Education, and Welfare, out of this position, "in part for pressing too hard on integration."[35]

II. The *Swann* Case

In 1969, in *Swann v. Charlotte-Mecklenburg Board of Education*, the U.S. District Court for the Western District of North Carolina ordered a plan to integrate schools in the county of Charlotte-Mecklenburg, North Carolina—the 43rd largest school district in the nation, spanning 550 square miles, and 107 schools.[36] The district court did so after finding that the Board's "pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development."[37] Although school officials had deliberately segregated students during the decades before the Court's decision in *Brown v. Board of Education*, contemporary school authorities argued that any segregation in the system should not be found unconstitutional because they were neither personally responsible for the segregated patterns that persisted nor culpable of harboring racial motives. The court acknowledged that the present-day school officials "did not originate" the patterns, but declared "now is the time to stop acquiescing in [the segregated] patterns."[38] The district court initially disavowed any judgment about the motives of present-day school officials,[39] observing that the present-day Charlotte school authorities had, in fact, done a relatively remarkable job at remedying segregation, "achiev[ing] a degree and volume of desegregation of schools apparently unsurpassed in these parts."[40] But the court's later opinion found that that the board's school location policies had reinforced residential segregation.[41]

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[34] *Id.* at 310.

[35] *The Administration: Bus Stop*, Time, Aug. 16, 1971, at 10.

[36] Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1364, 1373 (W.D.N.C. 1969).

[37] *Id.* at 1372.

[38] *Id.*

[39] *Id.* ("The observations in this opinion are *not* intended to reflect upon the motives or the judgment of the School Board members." (emphasis added)).

[40] *Id.*

[41] In its brief before the Supreme Court, the school board pointed out the district court's inconsistency on whether present school officials had engaged in race-motivated decision making:

Swann presented a question that had begun to arise in a number of cases, because official, state sponsored segregation was becoming more remote in time: could persistent segregated patterns be found unconstitutional when contemporary authorities denied racial motives, and had even by all counts made marginally successful efforts toward undoing segregation? The school board argued that present-day authorities were well intentioned, and any racial motivation was too remote to be a basis for holding contemporary authorities liable. This long after *Brown*, the motives question was irrelevant, and "[w]hat was left, North and South, was segregation in the schools in fact."[42]

When *Swann* reached the Supreme Court, Chief Justice Burger recognized its importance. He told the other justices that the case was so critical that he wanted to forego ordinary court procedures.[43] Normally, the justices would conference following argument, vote on their preferred outcome, and the most senior justice in the majority would assign the majority opinion.[44] Instead, Justice Burger held two special conferences in which, despite six justices expressing support for affirming the district court, he postponed taking a vote.[45] In the words of Justice Brennan's clerks, the "six were astounded" when Justice Burger suddenly circulated his own draft of the opinion reversing, rather than affirming, the district court's order. The draft came just one day after the second conference, meaning that Justice Burger must have been prepar-

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> the district court gratuitously and without the benefit of further evidentiary hearings reversed its previous findings that segregation in Charlotte was *de facto*. The trial judge attributed to the School Board every real or fancied ill that beset the Charlotte-Mecklenburg community and stemmed from federal, state, local and private action.

Brief of Respondents, *supra* note 5, at 43.

[42] *Id.* at 46.

[43] Opinions of William J. Brennan, Jr., at XXVII–XXVIII (October Term, 1970) (unpublished manuscript) (on file with the Brennan Papers at the Library of Congress Manuscript Division [Box II:6, Folder 6, No:70-281]).

[44] This convention has been well documented. *See* Bernard Schwartz, Decision: How the Supreme Court Decides Cases 44–55 (1996); Bernard Schwartz, *Swann*'s Way: The School Busing Case and the Supreme Court (1986); Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 506–07 (2005); Lawrence S. Wrightsman, Judicial Decision Making: Is Psychology Relevant? 97–98 (1999); The Douglas Letters 185 (Melvin I. Urofsky ed., 1987); Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 Law & Soc'y Rev. 349, 371 (2005); Kaitlyn L. Sill et al., *Strategic Passing and Opinion Assignment on the Burger Court*, 31 Just. Sys. J. 164 (2010).

[45] Opinions of William J. Brennan, Jr., *supra* note 43, at XXVII–XXVIII.

ing it months before the second conference.[46] Justice Douglas, the most senior justice in the majority, responded "[t]he case obviously was for me to assign and I would have assigned it to Stewart. To our surprise the Chief Justice assigned . . . himself . . . to write Nixon's view of 'freedom of choice' into the law."[47] Burger's draft found that the lower court had gone too far in ordering constitutional remedies for segregation that resulted from neighborhood school assignments and private residential segregation, factors that were not attributable to the racial motives of present day school authorities.[48] The justices in the majority voiced their disagreement with Burger's draft. Justice Douglas objected:

> You state, I believe that "discrimination" means the "discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." If this is the only "discrimination" that can be cured, the orders for integration would seem to be quite limited. Apparently the board could build schools to serve the population of the area, but should place them on the basis of numbers and need, not on race. Presumably a school could be built in the ghetto, or in the white neighborhood, if numbers required, and need not be integrated. A District Court would seem to have the task of determining if the board built any schools for the purpose of racial segregation. If so, the District Court would determine where schools would have been built, absent such a motive, construct attendance lines around those areas, and bus students to the schools in those areas which they would have attended. This does not seem likely to result in Blacks attending suburban schools or Whites attending schools in the central city.[49]

For Justice Douglas, there was sufficient state action in reinforcing segregation, even if the school board's motives for adopting neighborhood schools were benign, because it was "apparent and predictable" that "in Charlotte a neighborhood tends to be a group of homes generally simi-

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[46] *See* The Douglas Letters, *supra* note 44, at 178; Opinions of William J. Brennan, Jr., *supra* note 43, at XXVIII.

[47] The Douglas Letters, *supra* note 44, at 179–80.

[48] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1970).

[49] Letter from Justice Douglas to Chief Justice Burger 3–4 (Dec. 10, 1970) (on file with the Brennan Papers at the Library of Congress Manuscripts and Archives [Box I:242, No:70-281]).

lar in race and income."[50] Justice Brennan responded that "if a higher degree of integration is easily achievable, to stop at a lower degree of integration will be to adopt a state policy that encourages segregation . . . ."[51]

Justice Stewart circulated his own draft dissent that argued for affirming the district court's order, but took a moderate position, avoiding the question of whether the Constitution prohibits *de facto* segregation unrelated to state action. Instead, Justice Stewart described unconstitutional state action more broadly than subjective motives of immediate authorities. Stewart's account took the foreseeable long term effects of state policies into account, regardless of the motives of contemporary authorities. For Stewart, sustaining a system that had the foreseeable impact of preserving segregation was unconstitutional state action, regardless of what present authorities intended. Rather than speaking specifically of the *motives* of present administrators, Stewart focused on the state's "deep involvement" in "the maintenance" of segregated patterns over time.[52] The state's involvement in maintaining or reinforcing segregation was evident here because neighborhood assignment policies had the foreseeable effect of preserving segregated attendance patterns that mirrored segregated residential patterns. It was possible to make this assessment "disregard[ing]…the extremely difficult problems that arise when it is necessary to test for discriminatory intent the maze of administrative decisions through which school officials may influence the racial composition of student bodies."[53] Because "[a] public school system is not built in a day; it is not built in isolation from the community around it[;]" it develops "through innumerable decisions by hundreds of educational and noneducational officials acting in many different capacities[,]" and "[p]ractices, predispositions and attitudes build up in administrators, teachers, children, parents, and local noneducational officials[,]" the system "acquires a formidable stability and imper-

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[50] *See* Justice Douglas Draft Dissent in Swann v. Charlotte-Mecklenburg Bd. of Educ. 8–9 (Jan. 13, 1971) (on file the Brennan Papers at the Library of Congress Manuscripts Division [Box II:6 Folder 6, No: 70-281]).

[51] *See* Memorandum from Justice Brennan on Swann v. Charlotte-Mecklenburg Bd. of Educ. 3 (Dec. 30, 1970) (on file with the Brennan Papers at the Library of Congress Manuscripts Division [Box II:6, Folder 6, No: 70-281]).

[52] Justice Stewart Draft Dissent in Swann v. Charlotte-Mecklenburg Bd. of Educ. 4–5 (Feb. 1970) (on file with the Brennan Papers at the Library of Congress Manuscripts Division [Box II:6, Folder 6, No:70-281]).

[53] *Id.* at 5. I emphasize the words "deep involvement" because they encompass more than racial motivation: "involvement" can be incidental or tacit, and can be found without the "extremely difficult" inquiry into the purpose behind official decisions.

viousness to change[,]" that may persist despite "conscious decisions for change by those in positions of responsibility."[54] Remedial action is warranted to undo such deeply entrenched discrimination regardless of the motives of present-day authorities. Justices Douglas and Brennan told Justice Stewart that with one technical modification, he would have majority of five or six in support of his draft opinion "overnight."[55]

Once Justice Burger got word of the support for Stewart's draft, however, he told Stewart that he would modify his own draft into a unanimous opinion affirming the district court.[56] At this point, the majority of five or six (Stewart, Brennan, Douglas, Marshall, Harlan, and possibly White) supporting Stewart's draft were faced with a compromise. President Nixon's criticism of court ordered desegregation, and specifically the integration order in *Swann*, increased the majority's perception that a unanimous opinion was necessary.[57] If Justices Burger, Blackmun, and Black dissented, the divided decision would likely fuel opposition from Congress and the President, as well as support for pending legislation to strip courts of jurisdiction to remedy school desegregation. The other justices decided to compromise in order to reach a unanimous opinion affirming the district court's controversial integration order, even if it meant doing so based on reasoning that differed from the majority's preferences.[58]

After seven drafts, Justice Burger produced an opinion that the other members of the Court would join. Justice Burger's opinion makes the motives of present-day school authorities central to determining whether discrimination is unconstitutional: it states that school officials may negate an inference that one-race schools are unconstitutional by showing that the "racial composition is not the result of present or past

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[54] *Id.*

[55] The Douglas Letters, *supra* note 44, at 131.

[56] *See* Earl M. Maltz, The Chief Justiceship of Warren Burger, 1969–1986, at 179–81 (2000).

[57] *Id.* at 179–80 (noting that, "for political reasons, the members of the majority desperately needed a unanimous opinion; . . . and dissenting opinions would only increase the possibility of militant opposition").

[58] *See id.* at 180–81. For a much more thorough account of the Court's internal deliberations over *Swann* and how the justices compromised to Justice Burger's opinion because of the perceived importance of unanimity, see Schwartz, *Swann*'s Way, *supra* note 44, retelling the same account in even more detail, and Woodward & Armstrong, *supra* note 44. These more detailed historical accounts of the *Swann* decision do not engage in the legal analysis that is the purpose of this essay. They do not consider how Justice Burger's *Swann* opinion distinctly emphasized racial motives or how this difference was invoked in subsequent Equal Protection decisions.

discriminatory action *on their part.*"[59] The opinion suggests, contrary to the district court initially disclaiming any finding on racial motives, that the constitutional remedy is warranted here because school authorities purposefully segregated students. Justice Burger states that school locations "have been *used as a potent weapon* for creating or maintaining a state-segregated school system" by building schools *"specifically intended*" for black or white students, "clos[ing] schools which appeared likely to become racially mixed," and placing new schools in white suburban neighborhoods "*in order to maintain* the separation of the races . . . ."[60]

Unlike Justice Stewart's draft, which found unconstitutional discrimination because the neighborhood school assignments foreseeably maintained or reinforced private prejudice, Justice Burger's opinion states, "[o]ur objective in dealing with the issues presented by these cases . . . does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."[61] The opinion again emphasizes the subjective culpability of present-day school officials by recognizing that some degree of resegregation is likely to reoccur, but courts should not intervene "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools . . . ."[62] Although the majority prevailed in terms of securing its outcome, Justice Douglas expressed his dissatisfaction with the opinion, stating that "the Nixon sabotage worked in part."[63] Douglas was infuriated with Justice Burger's practice of assigning himself the majority opinion when he disagreed with its outcome; when this occurred in another important case, he chided "[w]hen a Chief Justice tries to bend the Court to his will by manipulating assignments, the integrity of the institution is imperiled . . . ."[64]

III. The Shift in Unconstitutional Discrimination

Observers did not appreciate the extent that *Swann v. Charlotte-Mecklenburg Board of Education* furthered an understanding of unconstitutional discrimination that had existed before with far less certainty. At the time of the *Swann* decision, Owen Fiss observed that *Swann* "added

[59] *Swann*, 402 U.S. at 26 (emphasis added).
[60] *Id.* at 21 (emphasis added).
[61] *See id.* at 23; Justice Stewart Draft Dissent, *supra* note 52.
[62] *Swann*, 402 U.S. at 32.
[63] *See* The Douglas Letters, *supra* note 44, at 179.
[64] *Id.* at 185.

another ingredient" to the constitutional analysis "emphasiz[ing] the role that past discriminatory conduct might have played in causing th[e] [segregated] patterns."[65] But he predicted that *Swann* indicated the Court was moving toward ruling that severe *de facto* segregation was unconstitutional, regardless of motives, because the racial motives were so remote in *Swann* that finding them "involve[d] significant elements of conjecture."[66] Fiss recognized that *Swann* stressed motivation by allowing authorities to avoid liability by showing that segregated patterns were not a result of their racial motives.[67] But he speculated that the Court's willingness to presume or infer racial motives in *Swann* (a highly "conjectural" finding, because the motives were so remote) indicated that any sort of segregated pattern would give rise to a finding of racial motivation, that would be difficult for authorities to disprove. But the cases following *Swann* belie this prediction, as lack of racial motivation became a central, effective defense to finding unconstitutional discrimination despite segregated patterns. Once Justices Powell and Rehnquist joined the Court, Justice Burger's *Swann* opinion leant significant traction to the four Nixon appointees who favored limiting constitutional liability to those culpable of race-motivated decision making.

Other cases that were decided during the same time period as *Swann* illustrate that the Court was debating the relevance of motives where former state officers had engaged in race-motivated decisions, but contemporary officials argued that their policies were not racially motivated. Justice Stewart's 1972 majority opinion in *Wright v. City of Emporia* held a town's effort to secede from its school district unconstitutional because it effectively reinforced segregation, regardless of whether the decision was animated by racial motives.[68] Just as in *Swann*, the defendant-school board in Emporia argued that, although officials imposing official segregation decades earlier were racially motivated, present authorities' decision to secede from the school district was not influenced by racial motives. Stewart took a position much closer to his draft *Swann* opinion, stating that because "an inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless[,] . . . a permissible purpose cannot sustain an action that has an imper-

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[65] Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. Chi. L. Rev. 697, 700 (1971).

[66] *Id.*

[67] *Id.* at 700–01.

[68] Wright v. City of Emporia, 407 U.S. 451, 462 (1972) (citing Palmer v. Thompson, 403 U.S. 217, 225 (1971)).

missible effect."[69] Justices Burger, Powell, Rehnquist, and Blackmun dissented, criticizing the majority for "far exceed[ing]" *Swann*.[70] The dissent stated that "normal judicial reluctance to probe the motives or purposes underlying official acts must yield to the realities in this very sensitive area of constitutional adjudication."[71] *Swann* and *Emporia* illustrate the Court's uncertainty about whether racial motives were necessary, and whether those motives had to be attributable to those currently or recently responsible, in order to find discriminatory patterns unconstitutional.

In 1973, in *Keyes v. School District No. 1*, the first case addressing a desegregation order in a northern city, the Court upheld a desegregation order based on a finding that school authorities had deliberately segregated students in schools in the central portion of the district.[72] The Court presumed that racial motivation in the central part of the school system suggested racial motives throughout. The Court emphasized the racial motives of particular authorities: because "the differentiating factor . . . [of] *de jure* segregation . . . to which we referred in *Swann* is *purpose* or *intent* to segregate . . . [,]"[73] authorities could negate the presumption that segregated schools in the outskirts of the district were also unconstitutional by showing that "their actions as to other segregated schools within the system were not also motivated by segregative intent."[74] In at least four subsequent cases, the Court relied on *Keyes* and *Swann* to limit efforts at racial inclusion that went beyond remedying racially-motivated conduct.[75]

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[69] *See id.* (citations omitted).

[70] *Id.* at 471 (Burger, C.J., dissenting). Justice Stewart distinguished *Swann* by saying it did not address the very narrow question of whether "a federal court may enjoin state or local officials from carving out a new school district from an existing district that has not yet completed the process of dismantling a system of enforced racial segregation." *Id.* at 453. But Stewart's statements about the irrelevance of racial motives were nonetheless in tension with *Swann*, as the dissent observed.

[71] *Id.* at 482.

[72] Keyes v. School Dist. No. 1, 413 U.S. 189, 213–14 (1973).

[73] *Id.* at 208.

[74] *See id.* at 209.

[75] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) ("[T]his Court[] [has] focus[ed] on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies."); Crawford v. Bd. of Educ., 458 U.S. 527, 537 n.15 (1982) ("A neighborhood school policy in itself does not offend the Fourteenth Amendment."); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 425 (1976) ("Since the post-1971 shifts in the racial makeup of some of the schools resulted from changes in the demographics . . . neither the school officials nor the District Court were 'constitutionally required to make year-by-year adjustments of the racial composition of student bodies once . . . racial discrimination through official action is eliminated from the system.'" (quoting

The Court also applied racial motives to limit constitutional remedies for employment, housing, and voting discrimination.[76] In 1979, in *Personnel Administrator of Massachusetts v. Feeney*, the Court quoted *Swann* for the proposition that "purposeful discrimination is 'the condition that offends the Constitution.'"[77] *Feeney* articulated what is understood to be the clearest statement of the contemporary standard: "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[78] This was extended to voting rights. The Court cited *Keyes* in holding that where redistricting has the effect of weakening minority voting, "an illicit purpose must be proved before a constitutional violation can be found."[79]

Since these decisions in the late 1970s, it has been taken for granted that courts only have the constitutional power to correct racially motivated action. But members of the Court have recently suggested extending this principle to restrict the policies that Congress can make.[80] Justices Roberts and Kennedy have argued that the Voting

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Swann, 402 U.S. at 1, 32)); Milliken v. Bradley, 418 U.S. 717, 738 (1974) ("*Swann* held, the task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution' . . . . '[T]he nature of the violation determines the scope of the remedy.'").

[76] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (denying a discrimination challenge to an ordinance that effectively excluded black residents from one area of the city by explaining, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts") (citing *Keyes*, 413 U.S. at 208); Washington v. Davis, 426 U.S. 229, 229, 240 (1976) (finding no unconstitutional discrimination where a police department's "verbal skill[s]" test disproportionately excluded black applicants and explaining, "school desegregation cases . . . adhere[] to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose") (citing *Keyes*, 413 U.S. at 205).

[77] Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (quoting *Swann*, 402 U.S. at 16).

[78] *See id.* at 279 (citation omitted).

[79] *See* City of Mobile, Ala. v. Bolden, 446 U.S. 55, 67–68 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, sec. 3, § 2 (codified as amended at 42 U.S.C. § 1973 (2005)), *as recognized in* Thornburg v. Gingles, 478 U.S. 30 (1986) (citing *Arlington Heights*, 429 U.S. at 264–65; *Davis*, 426 U.S. at 240; *Keyes*, 413 U.S. at 208).

[80] As discussed in note 4, Siegel explains that *Davis*, *Arlington Heights*, and *Feeney* represented a "settlement" with the political branches, whereby the Court shifted responsibility for antidiscrimination policy to elected officials. Siegel, however, observes that in recent years, the Court has eroded that settlement by exerting increasing control over the antidis-

Rights Act "forces states to engage in 'considerations of race that would doom a redistricting plan under the Fourteenth Amendment.'"[81] Justice Thomas contends that the "second generation barriers" to minority voting that Congress relied upon to reenact Section 5 in 2006 are "not probative of the type of purposeful discrimination" that justified a congressional remedy in 1965.[82] Justice Scalia has stated that the disparate impact provisions of Title VII, "requir[e] employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory."[83]

This argument is presented in the current challenge to the Voting Rights Act. There is concern that the Act is used to remedy discrimination not attributable to racial motives. In 2012, in *Shelby County v. Holder*, the U.S. Court of Appeals for the D.C. Circuit found that Congress relied largely on evidence of indirect barriers to minority voting, such as "'continued registration and turnout disparities'" when it reenacted Section 5.[84] In finding Section 5 justified, the court noted evidence of racial disparities—for instance, not one African American had ever been elected to statewide office in Mississippi, Louisiana, or South Carolina.[85] In the 2012 presidential election, courts relied upon Section 5 to block covered states from enacting voter identification laws and limits on early voting that were shown to disproportionately exclude or weaken the voting power of racial minorities.[86] The concern is that Section 5 addresses these discriminatory effects, without any proof of racial motives. *Amici* complain that "enforcement of Section 5 has morphed from ending racially discriminatory voting practices to forcing specific racial outcomes."[87] The dissent in *Shelby* asserted that by requiring states to ensure that their election policies do not weaken minority voting, Section 5 "mandates race-conscious decisionmaking" that is in "tension with . . .

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crimination policies that elected officials may adopt. Siegel, The Law (and Politics) of Disparate Impact, *supra* note 4, at 31–33.

[81] *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009) (quoting Georgia v. Ashcroft, 539 U.S. 461, 491–92 (2003) (Kennedy, J., concurring)).

[82] *Id.* at 228 (Thomas, J., concurring in part and dissenting in part).

[83] *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (citing *Feeney*, 442 U.S. at 279).

[84] Shelby Cnty. v. Holder, 679 F.3d 848, 862 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) (quoting H.R. Rep. No. 109-478, at 25 (2006)).

[85] *Id.*

[86] Adam Liptak, *Voting Rights Act Is Challenged as a Cure the South Has Outgrown*, N.Y. Times, Feb. 18, 2013, at A1.

[87] *See* Brief Amicus Curiae, *supra* note 1, at 6.

the Reconstruction Amendments' commitment to nondiscrimination."[88]

Conclusion

The story behind *Swann v. Charlotte-Mecklenburg Board of Education* illustrates that constitutional remedies were limited to race-motivated decisions, in part out of deference to Congress and the President, who objected to judges creating policy under the guise of constitutional remedies. Congress, however, has consistently chosen to define illegal discrimination more broadly than racial motivation. There are at least two good reasons that Congress could find it necessary to outlaw discriminatory effects, as well as discriminatory motives, in order to effectively combat racial discrimination.

First, defining discrimination in terms of invidious racial motivation is inconsistent with contemporary scientific understanding that discrimination mostly occurs subconsciously, rather than deliberately. Purposeful discrimination has long been recognized as immoral and taboo. As such, people are unlikely to recognize themselves as operating on prejudiced motives. An innate psychological drive to perceive ones' own conduct as moral causes cognitive dissonance avoidance, which leads people to genuinely perceive their actions as motivated by legitimate justifications.[89]And people who perceive themselves as neutral or non-prejudicial may be less on guard, and inadvertantly act in biased ways.[90] Even employers expressly seeking to diversify their work-

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[88] *Shelby Cnty.*, 679 F.3d at 887 (Williams, J., dissenting). In this essay, I am concerned primarily with the argument that Section 5 of the Voting Rights Act may violate the Fourteenth Amendment by requiring race-consciousness. The Court could reject this argument and nonetheless strike down Section 5 on the narrower grounds that the coverage formula is based on outdated data, and not adequately tailored to contemporary political conditions. This would allow Congress to reenact Section 5 to cover states in a way that is more closely based on current patterns of voting discrimination, rather than those that existed in 1965. *See* Liptak, *supra* note 86.

[89] Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 Soc. Phil. & Pol'y 22, 32 (1991) ("The beneficiaries of the status quo tend to . . . conclud[e] that the fate of victims is deserved, or is something for which victims are responsible, or is part of an intractable, given, or natural order . . . . The reduction of cognitive dissonance thus operates as a significant obstacle to the recognition that discrimination is a problem, or even that it exists.").

[90] *See* Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 Psychol. Bull. 546 (1980); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (arguing that government practices motivated by unconscious racial bias should violate equal protection); Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. Personality & Soc. Psychol. 33, 33–43 (2001). Studies find that people are more likely to express prejudicial decisions and attitudes when they perceive

force are likely to perceive job applicants with "white-sounding" names as better qualified than those with "black-sounding" names.[91] Such research suggests that much discrimiantory decision making occurs subconsciously, contrary to the good intentions of the decisionmaker. Many of those making discriminatory decisions are not conscious of their racial motives (indeed actively eschew seeing themselves as being motivated by race), and these decisions are not captured when discrimination is defined solely in terms of racial motives.

Second, as the Court recognized in *Wright v. City of Emporia*, looking for racial motivation is inconsistent with the way that official decisions are made.[92] In reality, as Justice Stewart's draft described, policies are designed by hundreds of uncoordinated decisions made by officials in various capacities, who probably never coalesce around one purposive mental state. Since limiting unconstitutional discrimination to racial motivation, the Court has recognized as much, stating, "[p]roving the motivation behind official action is often a problematic undertaking"[93] and "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make."[94] Indeed, when Congress reenacted Section 5 in 2006, it specifically overrode the Court's recent decision that had narrowed the "effect" prong of the section,[95] explaining, "over the last 30 years, Section 5's 'effect' prong has served to protect the minority communities' ability to elect candidates of choice in covered jurisdictions."[96]

Congress has repeatedly opted to define illegal discrimination more broadly than racial motivation, based on specialized findings about the way that discrimination realistically occurs and continues to burden constituents. Because Congress is better adept to these policy-making assessments, the Court recognizes that deference is due when it

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themselves as non-prejudiced. This illustrates that the drive to see oneself as moral and non-prejudiced leads people to avoid actions that they consciously recognize as prejudicial, and to exhibit more prejudice when they see themselves as non-prejudiced. Monin & Miller *supra*, at 33–43.

[91] Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at 12, 14–15.

[92] *See* Wright v. City of Emporia, 407 U.S. 451, 461 (1972); Palmer v. Thompson, 403 U.S. 217, 225 (1971).

[93] *See* Hunter v. Underwood, 471 U.S. 222, 228 (1985).

[94] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995).

[95] Georgia v. Ashcroft, 539 U.S. 461, 479–80 (2003) ("[A] court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice."); H.R. REP. NO. 109-478, at 69–71 (2006).

[96] H.R. REP. NO. 109-478, at 69.

judges the constitutionality of an Act of Congress.[97] *Swann* and subsequent decisions were consistent with respecting Congress's policymaking in the areas of school desegregation, employment, housing, and voting discrimination. As *Swann* shows, the contemporary understanding of unconstitutional discrimination gained traction out of deference to Congress and the President, who called for limits on *constitutional remedies* being used as a basis for judges making social policy. If the Court were to invalidate provisions of the Civil Rights Act on the basis that any form of racial motivation is unconstitutional discrimination, it would be in some senses contrary to the values underlying *Swann*. As the Court would be making social policy under the guise of a constitutional remedy; doing exactly what provoked the political resistance that spurred *Swann*'s limits on judicial remedies.

[97] *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 254–55 (2009) ("The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." (quoting Rostker v. Goldberg, 453 U.S. 57, 64 (1981)).